

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JOHN DIEKMAN

Plaintiff

v.

ENERGY CHOICE MARKETING,
INC., ET AL.

Defendants

CIVIL ACTION NO. 02-4681

DEFENDANTS' MOTION TO STRIKE THE AMENDED COMPLAINT

_____ Defendants Consumer Choice, Inc. (formerly known as Energy Choice Marketing, Inc.) ("CCT"), S&D Marketing, Inc. ("S&D") and Shai Fishman ("Fishman"), through their counsel, Burns & Kasmen, hereby move the Court pursuant to Rule 12(f) of the Federal Rules of Civil Procedure to strike the Amended Complaint of Plaintiff John Diekman ("Diekman") for failure of Diekman to comply with Rule 15(a) of the Federal Rule of Civil Procedure. As more fully described in the attached Memorandum of Law in Support hereof, the Amended Complaint was filed after all Defendants filed responsive pleadings and without leave of Court or written consent of Defendants' counsel. Accordingly, Defendants pray that the Amended Complaint be stricken and that the Court rule on the pending motions to dismiss the Complaint.

Respectfully submitted,

Date: November 12, 2002

Stephen G. Burns, Esq.
Andrew S. Kasmen
BURNS & KASMEN
261 Old York Road, Suite 630
Jenkintown, PA 19046
(215) 517-5800
Attorney for Defendants

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FOR THE EASTERN DISTRICT OF PENNSYLVANIA

_____	:	
JOHN DIEKMAN	:	
Plaintiff	:	
	:	CIVIL ACTION NO. 02-4681
v.	:	
	:	
ENERGY CHOICE MARKETING,	:	
INC., ET AL.	:	
Defendants	:	
_____	:	

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS' MOTION TO STRIKE THE
AMENDED COMPLAINT

Defendants Consumer Choice, Inc. (formerly known as Energy Choice Marketing, Inc.) ("CCI"), S&D Marketing, Inc. ("S&D") and Shai Fishman ("Fishman"), through their counsel Burns & Kamen, submit this Memorandum of Law in support of Defendants' Motion to Strike the Amended Complaint. Because Plaintiff John Diekman ("Diekman") filed and served the Amended Complaint after all Defendants had served responsive pleadings without obtaining leave of Court or written consent of Defendants' counsel, the Amended Complaint violates Rule 15(a) of the Federal Rules of Civil Procedure. For the reasons stated in more detail below, the Court should strike the Amended Complaint.

I. Statement of the Case

The Complaint named Energy Choice Marketing ("ECM"), CCI, Fishman, and S&D as defendants. Count I alleged that ECM, Fishman and S&D breached an employment agreement with Diekman. Count II alleged that Fishman and Diekman were "partners" at the time of the breach and that as such Fishman owed Diekman a fiduciary duty.

On September 12, 2002, Defendants ECM and CCI filed and served an Answer and Counterclaim. On September 13, 2002, Defendants Fishman and S&D each filed and served a Motion to Dismiss the Complaint under Rule 12(b)(6). On September 30, 2002 the parties held a settlement conference with Judge Reuter, but they were unable to settle this action.

Thereafter on October 17, 2002, without either obtaining leave of Court or the consent of Defendants' counsel, Diekman filed an Amended Complaint. The filing of the Amended Complaint violates Rule 15(a) of the Federal Rules of Civil Procedure which provides in part:

A party may amend the party's pleading once as a matter of course at any time before a responsive pleading is served.... Otherwise a party may amend the party's pleading only by leave of court or by written consent of the adverse party

Accordingly, the Amended Complaint should be stricken because it was filed improperly.

To the extent that the Court questions why Defendants have not consented to the filing of the Amended Complaint in the interest of judicial economy, the Court should be aware that Defendants believe that there are no viable causes of action against defendants Fishman and S&D. That is why each filed a Motion to Dismiss the Complaint. Defendants believe that Fishman and S&D were originally included as defendants solely as potential "deep pockets" even though they had no involvement in what is a breach of employment contract case between Diekman and an insolvent employer, Defendant CCI. If the Court grants Fishman's and S&D's pending motions to dismiss the Complaint, then Diekman will be precluded from embarking on the discovery fishing expedition which Diekman seeks in an effort to squeeze a settlement from third parties who were not signatories to the employment agreement. Ultimately, this case will proceed more quickly and efficiently if the Court hears argument on and rules on the pending motions to dismiss of Fishman and S&D which may considerably narrow the issues to be presented to the Court.

Accordingly, Defendants submit that the Court should rule on the two pending motions to dismiss and enter relief accordingly, and the Amended Complaint should be stricken at this time.
Respectfully submitted,

Date: November 12, 2002

Stephen G. Burns
Andrew S. Kasmien
BURNS & KASMEN
261 Old York Road, Suite 630
Jenkintown, PA 19046
Attorney for Defendants

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing Defendants' Motion to Strike the Amended Complaint was sent by first-class mail, postage prepaid to the following on the 12th day of November, 2002:

Michael McDonnell, Esquire
Ryan Brown McDonnell Berger and Gibbons
1600 Market Street, 14th Floor
Philadelphia, PA 19103-7240

Stephen G. Burns

ECM\Diekman\ motion to dismiss amd compl

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	:	
ENERGY CHOICE MARKETING,	:	
INC., ET AL.	:	
Defendants	:	
_____	:	

ORDER

____ Upon consideration of the Motion of Defendants to Strike the Amended Complaint and the response of Plaintiff thereto, it is

ORDERED that the Motion is granted and the Amended Complaint is hereby stricken.

Date _____ Joyner, J.